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Date: 12/21/06

By: Patti Hespell

Mail Stop Appeal Brief - PatentsIN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re: Patent Application of Charles A. Eldering et al.

Conf. No.: 8268 : Group Art Unit: 2623
Appln. No.: 09/750,812 : Examiner: John Manning
Filing Date: 28 December 2000 : Attorney Docket No.: T733-10
Title: Grouping Advertisement Subavails

APPELLANTS' BRIEF IN SUPPORT OF THE APPEAL TO THE BOARD
OF PATENT APPEALS AND INTERFERENCES

In response to the Final Rejection dated January 6, 2006, the Advisory Action dated June 12, 2006, and the Notice of Pre-Appeal Brief Review dated August 21, 2006, and further to the Notice of Appeal and Request for Pre-Appeal Brief Conference filed on June 26, 2006, Applicants hereby submit an Appeal Brief in accordance with 37 C.F.R. §41.37 for the above-referenced application.

This paper is being timely submitted by virtue of the accompanying Petition for Extension of Time (three-months), which extends the period available for reply through and including December 21, 2006.

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(A) REAL PARTY IN INTEREST

The real party in interest is Prime Research Alliance E., Inc., the Assignee of record, which is a wholly owned subsidiary of a privately-owned, non-publicly traded company.

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(B) RELATED APPEALS AND INTERFERENCES

There are no prior or pending appeals, judicial proceedings or interferences known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

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(C) STATUS OF CLAIMS

Claims 1-17 are canceled.

Claims 18-34 are pending, rejected and are appealed.

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(D) STATUS OF AMENDMENTS

No amendment has been filed subsequent to the final rejection.

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(E) SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter relates to a method and system for managing advertisement opportunities or avails in a television network environment (see for example, page 6, line 29 – page 7, line 7 of the specification). An advertisement opportunity, i.e., an avail, is recognized by an avail opportunities recognition module 104 (see, for example, Fig. 1 and page 7, lines 8-12 of the specification). A subavail generation module 106 (see Fig. 1 Specification, page 7, lines 8-12) creates a plurality of subavails (i.e., a portion of an advertisement opportunity; see page 4, lines 1-4 of the specification) based on the recognized advertisement opportunities, where each subavail is directed at a target audience group (see, for example, page 7, lines 25-29 of the specification). A subavail aggregation (or grouping) module 112 creates one or more groups of subavails by aggregating the subavails from at least two of the advertisement opportunities (see Fig. 1 and page 12, lines 14-16 of the specification). At least one of the groups of subavails has a total expected viewership that is greater than or equal to that of one of the advertisement opportunities from which the subavail group originated (see, for example, page 4, line 1 – page 5, line 2 and the paragraph bridging pages 14-15 of the specification).

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(F) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are presented for review in this appeal:

- a. Whether claims 18, 19, 21, 27, 29, 31, 32 and 34 are unpatentable under 35 U.S.C. §103(a) over U.S. Patent No. 5,652,615 to Bryant *et al.* ("Bryant") in view of U.S. Patent Application Publication No. 2002/0055880 to Unold *et al.* ("Unold"); and
- b. Whether claims 20, 22-26, 28, 30 and 33 are unpatentable under 35 U.S.C. §103(a) over Bryant in view of Unold and further in view of International Patent Application Publication No. WO 00/33163 to Eldering ("Eldering").

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(G) ARGUMENTS

(1) Rejection under 35 U.S.C. §103(a) over Bryant in view of Unold

(a) Claims 18, 19, 21, 29, 31 and 32

The Examiner has not established a *prima facie* case of obviousness to support the rejection of claims 18, 19, 21, 29, 31 and 32 because (i) the Examiner has not pointed to an objective teaching which suggests the motivation to combine them; (ii) the proposed combination would change the principle of operation of the primary reference; and (iii) all features of the claims are not taught by the proposed combination.

i. There Is No Suggestion or Motivation to Modify the References

The Examiner can satisfy the burden of *prima facie* obviousness only by showing an objective teaching in the prior art, or that knowledge generally available to one of ordinary skill in the art, would lead that individual to combine the relevant teachings of the references in the manner suggested by the Examiner. *See In re Fine*, 5 USPQ2d 1596, 1598 (Fed. Cir. 1998). The mere fact that the prior art could be modified in the manner proposed by the Examiner, does not make the modification obvious unless the prior art suggests the desirability of the modification. *See Ex Parte Dussaud*, 7 USPQ2d 1818, 1820 (Bd.Pat.App & Interf. 1988). *See* MPEP 2143.01(I).

The Examiner has failed to point to an objective teaching in Bryant, Unold or the knowledge generally available to one of ordinary skill in the art at the time of the claimed invention that suggests the desirability of combining these references. The Examiner has repeatedly contended that it would have been obvious to one of ordinary skill in the art to combine Bryant and Unold, but has failed to provide any support or explanation for this conclusion. The Examiner merely alleges that Unold "provides advertisers a convenient method of purchasing multiple advertisement opportunities" (Final Office Action, page 4; Advisory Action, page 2). Although the Examiner has provided a list of teachings from Unold's disclosure (Advisory Action, pages 2-3), such list does not provide an

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explanation as to why one of ordinary skill in the art would be motivated to utilize the teachings of Unold to modify Bryant, nor that one skilled in the art would recognize the advantages of doing so as alleged by the Examiner. Merely pointing out the existence of particular teachings in one reference is not sufficient to establish that there would be a motivation to combine that reference with another reference. The burden is on the Examiner to provide a convincing line of reasoning, based on knowledge generally available to one of ordinary skill in the art, established scientific principles or legal precedent, that there would have been a motivation to combine Bryant and Unold. *See* MPEP 2144. In this case the Examiner has simply provided a list of purported teachings of Unold, and there is simply no explanation why or how those teachings make Unold combinable with Bryant. As such, the Examiner has not established that there is a motivation to modify or otherwise combine Bryant and Unold.

ii. The Proposed Combination Changes the Principle of Operation

If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious. *See In re Ratti*, 270 F.2d 810, 123 U.S.P.Q. 349 (C.C.P.A. 1959); MPEP § 2143.01.

Applicants respectfully submit that the proposed combination of Bryant and Unold would change the principle of operation of Bryant's system, which operates by selecting fill segments during distribution of the program. Indeed, the Examiner concedes the principle of operation of Bryant's system, stating that "the fill segment is selected at the time of distribution" (Advisory Action, page 3, emphasis added). Nevertheless, the Examiner makes the contradictory contention that in Bryant's system "the groups of fill segments are selected before the time of distribution" (Advisory Action, page 3, emphasis added). The Examiner, however, does not provide any support for this later contention. Applicants respectfully submit that Bryant does not teach selecting groups of fill segments before the time of distribution, and therefore, Applicants respectfully dispute the Examiner's contention.

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As noted above, Bryant's system operates by selecting fill segments during distribution of the program: "During distribution of the program, the broadcaster or cable operator can insert segments and select segments based on the identification of the segments" (Bryant, column 5, lines 36-38). In Bryant, there is no predetermination of which particular fill segments will be inserted into the broadcast program, since the selection of a fill segment is conditionally based on, among other things, the "content of the program, demographics of the network and customer premises equipment" (Bryant, Abstract). In other words, in Bryant, if there are no viewers that match the intended demographic of a particular fill segment, then that particular fill segment will not be inserted into the broadcast program. In contrast, in Unold's system, an advertising spot is selected by an advertiser in advance of program distribution (Unold, paragraph [0010]). In Unold, an advertiser knows, unconditionally and in advance, that each selected advertisement will be shown in its reserved advertising spot. Thus, the operations of the two systems are mutually incompatible. If Bryant's system was modified so that the fill segments were selected, in advance of distribution, to be shown unconditionally, regardless of selection criteria (as in Unold), then Bryant's principle of operation would have been changed, since it would no longer be possible for Bryant's system to select advertisements conditionally during distribution. Accordingly, the Examiner's proposed combination is improper since such combination would change the principle of operation of the prior art being modified.

iii. The Proposed Combination Does Not Teach or Suggest All Claim Elements

When making a rejection under 35 U.S.C. § 103, the prior art references, when combined, must teach or suggest all of the claim limitations. *See* MPEP 2143.03. The combination of Bryant and Unold, even if proper, still does not teach or suggest all of the features of Applicants' claims.

First, neither Bryant nor Unold teaches the concept of expected viewership of an advertisement opportunity or subavail. The Examiner contends that Bryant teaches or suggests subavails that have expected viewership, by a general, unsupported allegation:

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A commercial or advertisement with no expected viewership renders the commercial or advertisement pointless. The purpose of advertising is to make something publicly and generally know [sic], which in the case of video broadcast equates to viewership" (Advisory Action, page 3).

The Examiner does not provide any support for this contention, nor does Bryant even mention of viewership, expected or otherwise. Rather, the Examiner goes on to make another general allegation that "a commercial or advertisement has an expected viewership" (Advisory Action, page 4). Making such a general allegation without providing support does not establish that Bryant teaches or suggests that "each subavail is associated with a portion of the expected viewership of its corresponding advertisement opportunity," as recited in independent claims 18 and 29. Therefore, Applicants respectfully dispute the Examiner's contention that Bryant teaches or suggests subavails that have expected viewership; in fact, Bryant does neither.

Second, the combination of Bryant and Unold does not teach or suggest "aggregating the plurality of subavails from at least two of the advertisement opportunities, wherein at least one of the groups of subavails has a total expected viewership greater than or equal to the expected viewership of one of the advertisement opportunities from which the subavails in the at least one group originated," as recited in independent claim 18 and similarly recited in independent claim 29. The Examiner's argument that "more than one commercial or advertisement will have an expected viewership that is equal to or greater than the single commercial or advertisement" (Advisory Action, page 4, emphasis added) pertains to subavails from within a single advertisement opportunity, and therefore is not relevant to Applicants' claims. Applicants do not dispute that the sum of the expected viewerships of a group of subavails that originated from a single advertisement opportunity may be less than or equal to (but not greater than) the total expected viewership of that single advertisement opportunity. However, there is a clear distinction between grouping subavails from a single advertisement opportunity vs. from two or more advertisement opportunities. Although Applicants have repeatedly pointed out this distinction to the Examiner, both in

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written responses and during a personal interview conducted on August 17, 2005, the Examiner simply fails to acknowledge such a distinction.

To help illustrate this feature, consider the example of Fig. A below. Fig. A is essentially Fig. 2 of the present application with additional annotation to illustrate an example for purposes of the present Appeal. Fig. A shows three different channels labeled as Channel #1, Channel #2 and Channel #3. Each of the three channels has three separate avails (advertisement opportunities) 210: Channel #1 includes Avails A1, B1 and C1; Channel #2 includes Avails A2, B2 and C2; and Channel #3 includes Avails A3, B3 and C3.

Each avail has a total expected viewership, designated for purposes of the present example. In the example of Fig. A, Avail B1 has a total expected viewership of 21. Similarly, the total expected viewerships of Avail B2 and B3 are 32 and 13, respectively.

Each of the avails is subdivided into subavails 220. In the example of Fig. A, Avail B1 and Avail B2 are each subdivided into four subavails; Avail B3 is subdivided into five subavails. Each subavail forms a part of the expected viewership of its respective avail. Thus, in Fig. A, the expected viewership of the four subavails of Avail B1 is 2, 5, 11 and 3, respectively, which equals the total expected viewership Avail B1, or 21.

In the example of Fig. A, a group of subavails 200 (denoted by the three shaded subavails in Fig. A) is generated by aggregating the subavail of Avail B1 that has an expected viewership of 11, the subavail of Avail B2 that has an expected viewership of 12, and the subavail of Avail B3 that has an expected viewership of 3. The total expected viewership of this aggregated subavail group is 26. This total expected viewership is greater than the expected viewership of both Avail B1 and Avail B3. Thus, the total expected viewership of the subavail group 200 in Fig. A is "greater than or equal to the expected viewership of one of the advertisement opportunities from which the subavails in the at least one group originated," as recited in independent claims 18 and 29.

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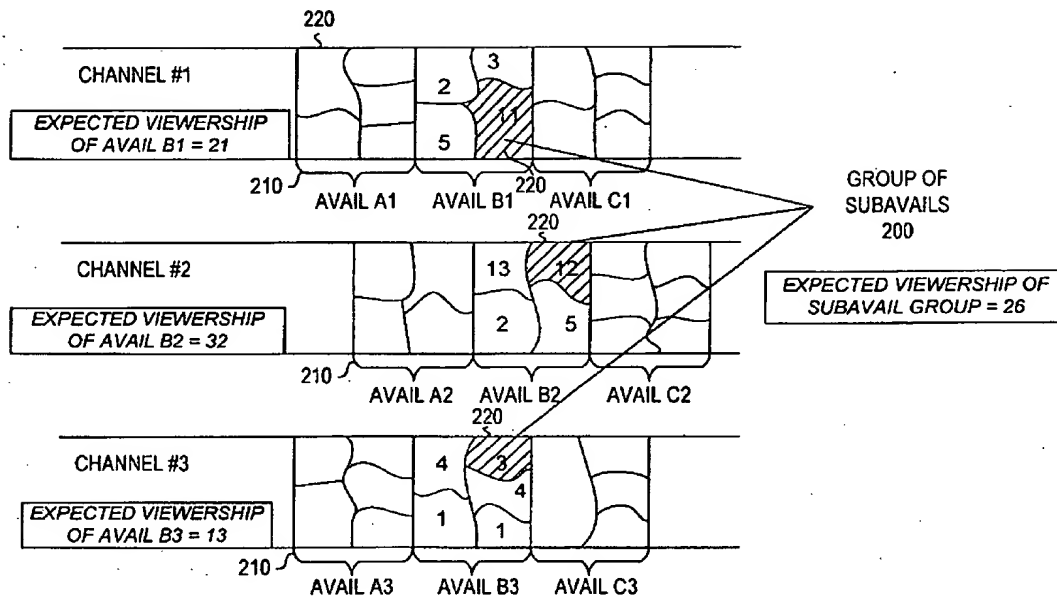


Fig. A: Expected Viewership of an Aggregated Subavail Group

Fig. B illustrates a second example in which the group of subavails 200 is generated by aggregating four subavails from a different set of avails, Avail A1, Avail C2 and Avail B3, which have total expected viewerships of 22, 30 and 15, respectively. The total expected viewership of the aggregated subavail group 200 is 34, which is greater than the expected viewership of Avail A1, Avail C2 and Avail B3.

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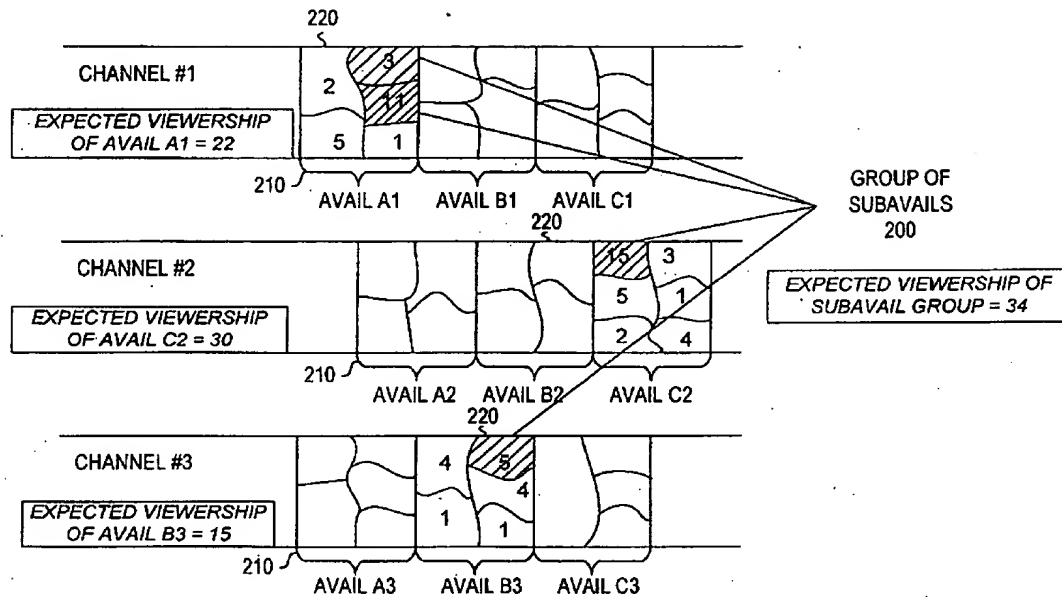


Fig. B: Expected Viewership of an Aggregated Subavail Group

Thus, the total expected viewership of the subavail group 200 in the examples of both Fig. A and Fig. B is “greater than or equal to the expected viewership of one of the advertisement opportunities from which the subavails in the at least one group originated,” as recited in independent claims 18 and 29. The combination of Bryant and Unold does not teach or suggest this feature. There is simply no teaching in either reference of aggregating a group of subavails in the manner recited in independent claims 18 and 29, and as exemplified in the examples of Figs. A and B set forth above.

In view of the foregoing, Applicants respectfully submit that the combination of Bryant and Unold is improper since the Examiner has not pointed to an objective teaching which suggests the motivation to combine them and such a combination would require a fundamental change in operation of the primary reference. Even assuming the references were properly combinable, which they are not, all features of the claims would still not be taught by the combination. Therefore, the Examiner has not met the burden of *prima facie* obviousness. Accordingly, for the reasons detailed herein, independent claims 18 and 29, and all claims dependent thereon, including claims 19, 21, 31 and 32, are allowable over the combination of Bryant and Unold.

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(b) Claims 27 and 34

For the reasons set forth above, the Examiner has not established a *prima facie* case of obviousness with respect to claims 18, 19, 21, 29, 31 and 32. Thus, the same arguments with respect to no motivation to combine Bryant and Unold, changing the principle of operation of Bryant, and the failure of such combination to teach all elements of the claims are applicable to dependent claims 27 and 34. Accordingly, claims 27 and 34 are believed to be allowable at least by their dependency on independent claims 18 and 29, respectively.

In addition, the Examiner has rejected claims 27 and 34 on the grounds that Bryant "discloses that the subavails are grouped by combining a plurality of time-sequenced subavails" (Final Office Action, pages 4 and 6). In support of the rejection, the Examiner cites Bryant: "The segments are adjacently arranged in a temporal manner, substantially without overlap, and with the base and fill segments alternating" (Bryant, column 4, lines 48-50).

The above cited teaching of Bryant is not relevant, however, to the Applicants' claims. Bryant merely teaches that the base and fill segments are adjacently arranged in time, but does not teach grouping the base and fill segments. Therefore, Bryant does not teach that "the subavails are grouped by combining a plurality of time-sequenced subavails," as recited by claims 27 and 34. Thus, Bryant does not teach all of the elements of claims 27 and 34. Accordingly, for the reasons detailed herein, claims 27 and 34, and all claims dependent thereon, are allowable over the combination of Bryant and Unold.

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(2) Rejection under 35 U.S.C. §103(a) over Bryant in view of Unold and Eldering

(a) Claims 20, 22-25 and 30

For the reasons set forth above, the Examiner has not established a *prima facie* case of obviousness with respect to independent claims 18 and 29. Thus, the same arguments with respect to no motivation to combine Bryant and Unold, changing the principle of operation of Bryant, and the failure of such combination to teach all elements of the claims are applicable to dependent claims 20, 22-25 and 30, and the proposed combination of Bryant, Unold and Eldering. Accordingly, claims 20, 22-25 and 30 are believed to be allowable at least by their dependency on independent claims 18 and 29, respectively.

(b) Claims 26, 28 and 33

For the reasons set forth above, the Examiner has not established a *prima facie* case of obviousness with respect to claims 18 and 29. Thus, the same arguments with respect to no motivation to combine Bryant and Unold, changing the principle of operation of Bryant, and the failure of such combination to teach all elements of the claims are applicable to dependent claims 26, 28 and 33, and the proposed combination of Bryant, Unold and Eldering. Accordingly, claims 26, 28 and 33 are believed to be allowable at least by their dependency on independent claims 18 and 29, respectively.

In addition, the Examiner has rejected claims 26 and 33 on the grounds that "it would have been clearly obvious to one of ordinary skill in the art to further modify the combined teaching to have avails that are grouped by combining a plurality of subavails across different channels so as to increase the chance of the profiled subscriber receiving the targeted advertisement over a channel range" (Final Office Action, pages 10-12).

With respect to claim 28, the Examiner has asserted that "it would have clearly obvious to one of ordinary skill in the art to further modify the combined teaching to have subavails that are gathered from the same channel so as to increase the chance of the

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profiled subscriber receiving the targeted advertisement over time" (Final Office Action, page 11).

However, the Examiner has failed to provide a relevant reference, as required by the MPEP, in support of the Official Notice taken by the Examiner that "it is notoriously well known to group plurality of advertisements across different channels so as to increase the chance of the profiled subscriber receiving the targeted advertisement over a channel range," or that "it is notoriously well known to have advertisements that are gathered from the same channel so as to increase the chance of the profiled subscriber receiving the targeted advertisement over time."

The Examiner contends that Applicants have failed to adequately traverse the Official Notices relied upon in the previous Office Actions (Advisory Action, page 4). Applicants respectfully disagree, as Applicants properly traversed the Examiner's taking of Official Notice in the Response After Final Rejection (see page 6). Moreover, Applicants once again point out that the burden is on the Examiner to produce a reference substantiating the Official Notice:

It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known.... If such notice is taken, the basis for such reasoning must be set forth explicitly (MPEP 2144.03).

Thus, the burden is not on Applicants to prove that the Official Notice is incorrect. Rather, the Examiner is required to produce a relevant reference that would support the Official Notice. Applicants cannot prove the absence of common knowledge and simply guess at the Examiner's interpretation of what is common knowledge, nor are Applicants required to do so.

Accordingly, for the reasons detailed herein, claims 26, 28 and 33 are allowable over the combination of Bryant and Unold and Eldering.

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Conclusion

For the reasons set forth above, Applicants submit that the rejection of claims 18-34 is in error, and that the application, including claims 18-34 is in condition for allowance. Accordingly, Applicants respectfully request that the Board reverse the Examiner's rejections of claims 18-34 and remand this application for issue.

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(H) CLAIMS APPENDIX

18. A method of managing advertisement opportunities or avails in a television network environment, the method comprising:

(a) recognizing one or more advertisement opportunities, each advertisement opportunity having an expected viewership;

(b) creating a plurality of subavails based on the recognized advertisement opportunities, wherein each subavail is directed at a target audience group and each subavail is associated with a portion of the expected viewership of its corresponding advertisement opportunity; and

(c) generating one or more groups of subavails by aggregating the plurality of subavails from at least two of the advertisement opportunities, wherein at least one of the groups of subavails has a total expected viewership greater than or equal to the expected viewership of one of the advertisement opportunities from which the subavails in the at least one group originated.

19. The method of claim 18, further comprising:

(d) selling the groups of subavails to one or more prospective advertisers.

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20. The method of claim 19, further comprising:

(e) receiving one or more bids for each group of subavails; and

(f) selling the group of subavails to the highest bidder.

21. The method of claim 18, further comprising:

(d) gathering one or more subscriber characteristics of the target audience group;

and

(e) correlating the subscriber characteristics to the groups of subavails.

22. The method of claim 21, further comprising:

(f) determining pricing for the groups of subavails based on the correlation.

23. The method of claim 22, further comprising:

(g) selling the groups of subavails based on the determined pricing.

24. The method of claim 21, further comprising:

(f) transmitting the correlation results to one or more prospective advertisers;

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(g) receiving one or more bids for each group of subavails; and

(h) selling the group of subavails to the highest bidder.

25. The method of claim 21, further comprising:

(f) receiving information about one or more advertisements to be placed in the subavails;

(g) characterizing the advertisements; and

(h) inserting the advertisements in the subavails based on a correlation of the advertisements and the subscriber groups.

26. The method of claim 18, wherein the subavails are grouped by combining a plurality of subavails across different channels.

27. The method of claim 18, wherein the subavails are grouped by combining a plurality of time-sequenced subavails.

28. The method of claim 27, wherein the subavails are gathered from a channel.

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29. An advertisement management system for managing advertisement opportunities or avails in a television network environment, the system comprising:

an advertisement opportunities recognition module configured to recognize advertisement opportunities, each advertisement opportunity having an expected viewership;

a subavail generation module configured to create a plurality of subavails based on the recognized advertisement opportunities, wherein each subavail is directed at a target audience group and each subavail is associated with a portion of the expected viewership of its corresponding advertisement opportunity; and

a grouping module configured to create one or more groups of subavails by aggregating the plurality of subavails from at least two of the advertisement opportunities, wherein at least one of the groups of subavails has a total expected viewership greater than or equal to the expected viewership of one of the advertisement opportunities from which the subavails in the at least one group originated.

30. The system of claim 29, further comprising a sales module configured to sell the groups of subavails to one or more prospective advertisers.

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31. The system of claim 29, further comprising:

a subscriber characterization module configured to gather subscriber characteristics; and

a correlation module configured to correlate the subscriber characteristics to the groups of subavails.

32. The system of claim 31, wherein the correlation module correlates the subscriber characteristics to advertisements.

33. The system of claim 29, wherein the subavails are grouped by combining a plurality of subavails across different channels.

34. The system of claim 29, wherein the subavails are grouped by combining a plurality of time-sequenced subavails.

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(I) **EVIDENCE APPENDIX**

None.

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(J) RELATED PROCEEDINGS APPENDIX

None.

Respectfully submitted,

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